IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1158 OF 2004

Ramsara Dukhiram Singh & Anr. ... Appellants.
Versus.
Baban Fakir Mhatre & others. ... Respondents.

Shri R.A.Thorat for the Appellants.

Shri K.S.Dewal for the Respondent No.1.

CORAM : ABHAY S. OKA, J.

DATED : 10th February, 2005.

P.C.:

1. The Second Appeal is filed by the original Defendants.

2. The dispute is regarding an apartment which was admittedly acquired by the original Plaintiff No.1 from the City and Industrial Development Corporation of Maharashtra Ltd. (CIDCO for short). The case of the Appellant is that a Power of Attorney was executed by the Respondent No.1 (Plaintiff No.1) in favour of one Umanand Shridhar Pandey under which he was permitted to sell and create third party interest in respect of the suit premises. The Appellants claim that the said Pandey executed agreement for sale on 20th January 1987 in their favour for consideration of Rs.21,000/- and the same has been registered. The case of the Appellants is that the said Power of Attorney holder had a right to

transfer the apartment in their favour.

3. The case of the Respondents is that the transfer fee was paid on 15th July 1996 to the CIDCO for transfer of the apartment in the name of the Respondent No.2, who is the son of the Respondent No.1, and accordingly the apartment was transferred in the name of Respondent No.2.

4. A suit was filed by the Respondents for possession of the said apartment and for restoration of the suit premises to its original condition after removal of the internal construction and demolition of the wall constructed by the Appellants. The suit was contested by the Appellants by contending that the said Umanand Pandey pursuant to the Power of Attorney executed in his favour has executed an agreement for sale in favour of the Appellants and the Appellants are in lawful possession of the said apartment and that they have paid consideration of Rs.21,000/- under the said agreement. Their case is that they are the bonafide purchasers.

5. The suit was dismissed by the trial Court. An Appeal was preferred by the Respondents in the District Court. The Appellate Court allowed the said Appeal and passed a decree for possession. The Appellate Court held that the Power of Attorney allegedly executed by the Respondent No.1 in favour of the said Pandey could

not have been exhibited.

6. Shri Thorat, the learned Counsel appearing for the Appellants submitted that the Power of Attorney executed by the Respondent No.1 in favour of said Umanand Pandey was admitted in evidence and marked as Exhibit 49. He submitted that the said Power of Attorney is duly proved in evidence. He submitted that as the said Pandey was authorised to sell the apartment, the agreement for sale executed by the said Pandey is binding on the Respondents. He submitted that consideration of Rs.21,000/- was paid to Shri Pandey who was authorised to accept consideration on behalf of the Respondents. He, therefore, submitted that the Appellants are entitled to protect their possession and the decree for possession could not have been passed.

7. Shri Dewal, the learned Counsel appearing for the Respondent No.1 has supported the impugned Judgment and Decree by pointing out various findings recorded by the learned Appellate Court.

8. I have considered the rival submissions. The Appellants claim title on the basis of the agreement for sale executed by Umanand Pandey. The said agreement for sale will bind the Respondents provided the execution of the alleged Power of Attorney by the Respondent No.1 in favour of the said Umanand Pandey is proved. It is an

admitted position that the said Umanand Pandey has not been examined by the Appellants as their witness. When the Respondent No.1/Plaintiff No.1 stepped into the witness box he could have been confronted by showing him the original Power of Attorney. The Appellate Court has recorded that he was not confronted with the Power of Attorney and no question on the said document was asked. In the circumstances, the Appellate Court has held that the Power of Attorney which is marked as Exhibit was not at all proved in accordance with the law. Therefore, the Appellate Court held that as the Power of Attorney was not proved, the Appellants cannot claim any title or right to occupy the apartment.

9. It is obvious that the execution of the Power of Attorney could have been proved by examining the so called Power of Attorney holder or any person before whom the Power of Attorney was executed. However, that was not done. Moreover the Respondent No.1 was not confronted with the so called Power of Attorney in his cross-examination.

10. I find no fault with the findings recorded by the Appellate Court. There is no substantial question of law arising in the Second Appeal.

11. Shri Dewal at this stage submitted that without prejudice to the rights and contentions of the

Respondents, and by way of ex-gratia payment, the Respondents will deposit a sum of Rs.20,000/- within a period of 6 weeks from today in the trial Court. He stated that the said amount may be paid over to the Appellants only after they hand over vacant possession of the suit premises to the Respondents. The statement made by Shri Dewal is accepted. He has stated that he has made this statement on instruction from the Respondent no.1 who is stated to be present in Court.

12. Hence the following order is passed:

(i) The Appeal is dismissed with no order as to costs.

(ii) The Respondents will deposit a sum of Rs.20,000/- in the trial Court by way of ex-gratia payment without prejudice to their rights and contentions. The Amount shall be deposited within six weeks from today. After vacating the suit premises and handing over vacant and peaceful possession thereof to the Respondents within a period of 8 weeks from today, the trial Court will permit the Appellants to withdraw the said amount of Rs.20,000/-. If the Appellants fail to hand over vacant and peaceful possession of the suit

premises to the Respondents within the stipulated period of 8 weeks, the Respondents will be free to execute the Decree for possession and will also be entitled to withdraw the said amount deposited by them in the trial Court. If the Appellants fail to comply with the Decree for possession within 8 weeks from today, they will not be entitled to claim the said amount.

(iii) On the request made by Shri Thorat, the decree for possession shall not be executed for a period of 8 weeks from today, subject to condition that the Appellants will not create any third party interest and will not part with possession of the suit premises.

(iv) The parties and the concerned Court to act on an authenticated copy of this order.

Judge.